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CONTRACT LIMITATIONS OF THE COMMON CARRIER'S LIABILITY.

WHEN Mr. Justice NELSON, in the *New Jersey Steam Navigation Company v. Merchants' Bank*,¹ speaking of the power of a common carrier by special agreement to restrict his obligation, said for the court: "We are unable to perceive any well founded objection to the restriction," he opened the way for an amount of litigation which, in volume and expense, both to carriers and shippers, scarcely finds its equal on any other question. The Supreme Court of North Carolina was well within the limit when it said: "The right of a common carrier to limit or diminish his general liability by a special contract has given rise to as much, if not more discussion and contrarities of opinion than any other question of law."² Mr. SCHOULER, in his work on *Bailments and Carriers*, has well said: "The reports bear ample record of the unflagging perseverance with which the common carriers seek to make decreased responsibility to the public the price of affording to the public increased facilities of transportation; of his quickness in coaxing, entrapping, even coercing, his customers in accomplishing this furtherance of his own ends." The far reaching consequences of a single sentence in a judicial opinion, concerning what had generally been, and may still be, regarded as at best a doubtful question, can hardly be better exemplified than by the consequences flowing from the opinion of Mr. Justice NELSON, above referred to.

Indeed, now, after sixty-one years, there is no evidence of any diminution in the volume of litigation on the questions involved in that opinion. It might be supposed that, after

¹ 6 How. (U. S.) 344.

² *Capehart v. Seaboard etc. R. Co.*, 81 N. C. 438, 31 Am. Rep. 505.

the thousands of times in which the courts have reiterated the doctrine, which is undoubtedly established, that a common carrier cannot by a special contract secure exemption from liability for the results of his negligence, it would no longer be necessary to refer to that principle. A casual examination of the current digests will speedily show that this is not the case. The current reports are full of cases in which the courts consider it necessary to reiterate this long established principle, and of cases in which attorneys for different carriers are urging upon the attention of the courts contracts intended to secure these forbidden exemptions. A single illustration may suffice to stand for many cases that might be referred to. The Court of Civil Appeals of Texas as late as 1908³ was asked to hold that the trial court had committed error in not upholding a contract limiting the liability of a carrier to loss due to his gross negligence. The higher court felt called upon to say: "A common carrier cannot by contract relieve itself from liability for loss or injury arising from its negligence," a principle which it would seem might now be accepted without further restatement. On this whole subject an extended and interesting note will be found in Volume 88 of the American State Reports, page 74.

In all these discussions the case of the *New Jersey Steam Navigation Company v. Merchants' Bank*, supra, stands out as the first and leading authority. An examination of this case reveals many points of interest. In the first place, the question of the power, by contract, to secure exemption from liability for negligence was not quite necessary to a decision of the case. The court explicitly finds that, whether such a contract could in any case avail, it could not in the present case, since the general terms used in the contract would not be construed to excuse the losses, which the evidence showed had resulted from the gross negligence of the carrier. "If," said the court, "it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties." The general and broad language of the contract, the court thought, could not upon any reasonable and fair construction be regarded as stipulating for willful misconduct, gross negligence, or want of ordinary care. This was enough to have disposed of the case, and the court might very well have adopted the language of Mr. Justice BRONSON in the celebrated case of *Hollister*

³ *International & G. N. R. Co. v. Vandeventer* (Tex.), 107 S. W. 560.

v. *Nowlen*⁴ to the effect that "whatever validity might or might not be conceded to a contract as to a carrier's obligations, the contract in question could not avail to excuse the company from its liability in this case for losses which were shown to have resulted from its gross negligence." But the United States Supreme Court did not do this. Instead, it held that a carrier might by special contract, assented to by the shipper, secure limitations on its common law liability, and this opinion, whether originally *obiter dictum* or not, has been followed as authority on this point in every state court and in every subsequent case in the federal courts. And such is the law today in every jurisdiction where it has not been specifically changed by statutory or constitutional provisions. It is believed, however, that every reason brought forward by Mr. Justice NELSON, in support of the rule he laid down, has been long since widely repudiated. The rule, however, stands.

A brief historical review will be useful in throwing some light upon its present day aspects, for, as has already been noted, the question in new forms and old is continually coming before the courts even after all these years. In this country the first great case of importance on this question is that of *Hollister v. Nowlen*⁵ decided in 1838. This was a case involving the effect of a general notice, and the language of Mr. Justice BRONSON on that matter has been universally approved by the courts of this country. "Putting the matter in the most favorable light for the carrier, the mere delivery of goods, after seeing a notice, cannot warrant a stronger presumption that the owner intended to consent to a restricted liability on the part of the carrier than it does that he intended to insist on the liabilities imposed by law; and a special contract cannot be implied where there is such an equipoise of probabilities." In the course of the opinion, BRONSON, J., while expressing grave doubts that "the carrier may by express contract restrict liability," said that, if he could do so at all, it must be on the ground that, although usually in the employment of a common carrier, he does not act in the particular case as a common carrier. The parties agree that in that transaction he shall throw off his responsibility as public carrier and act as an ordinary bailee for hire. The learned Judge adds: "If he act as a common carrier, it is difficult to understand how he can make a valid contract to be discharged from a duty or liability imposed upon him by law." In any event a general notice cannot avail to secure exemptions from liability.

The next great case is the *New Jersey Steam Navigation Com-*

⁴ 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

⁵ 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

pany v. Merchants' Bank, in which, following the first part of the above suggestion, Mr. Justice NELSON overlooks entirely the difficulties of the last part. "The owner," he says, "by entering into the contract, virtually agrees that in respect to the particular case the carrier is not to be regarded as in the exercise of a public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and who is answerable only for misconduct or neglect." The doctrine as so stated, it is believed, has nowhere found favor with the courts, and has long since been repudiated by the court from which it was first uttered. Further on, in the same opinion, the extraordinary statement is made that "The right of the carrier thus to limit his liability in the shipment of goods has, we think, never been doubted." Only three paragraphs back in this very opinion, this judge had said that the New York Court, after a very full consideration of the matter in *Gould v. Hill*,⁶ had arrived at the conclusion that a carrier could not restrict his obligation, even by special agreement and he notes two other New York cases⁷ as being concluded the same way. It will later be shown that prior to this case the American decisions, so far from not doubting the carrier's right to restrict his liability, seem either to have been in grave doubt of it or else altogether to have denied it.

As this was a pioneer case, the opinion of the learned justice is not to be submitted to a criticism based upon all that has developed since, for not even a son of a prophet could have discerned sixty years ago the importance and bearings of the decision of that case. But looking back upon it through these years, I hazard nothing in saying that in view of our present knowledge it is not, upon the main points involved, a well reasoned case. On another point it occasioned misunderstanding and trouble. Possibly with a prescience of the unfortunate results to follow, the Justice asked whether the contract in question was efficient to excuse the carrier. Its language was plain and unmistakable. It put all liability whatever off the defendant and upon William F. Harnden, the fore-runner of the enormous business now carried on by the express companies. But its terms were general and broad and would not be interpreted by the court to excuse the carrier from liability for the gross negligence shown in this case. "If," said the court, "it is competent at all for the carrier to stipulate for gross negligence, it must be done in terms that leave no doubt as to the meaning of

⁶ 2 Hill (N. Y.) 623.

⁷ *Hollister v. Nowlen*, 19 Wend. (N. Y.) 240, 32 Am. Dec. 455, and *Cole v. Goodwin*, 19 Wend. (N. Y.) 282, 32 Am. Dec. 470.

the parties." This language was unfortunate. The natural inference therefrom was that a contract, which did in plain terms stipulate for the negligence of the carrier, would be effective. If no such contract could be made, why did not the court say so at once and thus eliminate all question of liability for negligence? Such a holding would not have been more *obiter* than its whole discussion as to the validity of a contract limiting the common law liability of the carrier. That the language used suggested at least the possibility of valid stipulations against negligence, is shown by the fact that the New York Court, which we have seen had first doubted and then utterly denied the right of the carrier by contract to restrict his common law liability, now felt bound to follow the decision of the Supreme Court of the United States. Accordingly, when the matter was again presented, the New York Court reversed the rule before laid down, and, in accordance with what it understood the United States Supreme Court to have held, in later cases announced that a special contract might cover restrictions, even to the extent of excusing for negligence where that was a specific term of the contract.⁸ The New York Court, having thus reversed itself in order to come into accord with what it understood to be the rule laid down by the Federal Supreme Court, later refused again to reverse itself in order to keep in line with the Federal Court, after the latter, in the great case of the *Railroad v. Lockwood*⁹ had declined to allow contract exemptions by the carrier to cover negligence.

We may now turn aside for a moment to note the general trend of judicial opinion in England, where between 1804 and 1830 the doctrine of limitation by contract, and even by notice, came in, "a recent innovation" as it was termed. The injury to the public and the trouble for the courts were such that Parliament, in 1830, interfered and to a considerable extent restored the rule to the early common law.¹⁰ Later in 1854, by the Railway and Canal Traffic Act, Parliament provided that any contract, affecting the liability of the common carrier, must be signed by the shipper, and its terms must be such as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable. If this rule permitting restrictions upon the carrier's liability, as finally approved by the English courts, was a rule of the common law, it is extraordinary that, down to the time of the American Revolution, no English court seems to have held that

⁸ *Welles v. N. Y. C. R. Co.*, 26 Barb. (N. Y.) 641; Aff. 24 N. Y. 181.

⁹ 17 Wall. (U. S.) 357.

¹⁰ See Historical Resumé in *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234.

there might by contract be any relaxation of the common law liability of the common carrier as an insurer, although Lord ELLENBOROUGH says¹¹ that an exemption by contract has never been "by express decision denied." It seems rather that the courts departed from the law and Parliament in part restored the old law. Such is the general view in England.

Certain it is that in America for half a century down to 1838 the doctrine of limitation by contract found no recognition¹² and it was not until ten years later, in the case of the *New Jersey Navigation Company v. Merchants' Bank*, supra, that it was expressly adjudicated that such a contract might be effectual. Either this doctrine was a piece of judicial legislation or else we must make the extraordinary supposition that, down to 1848, common carriers had not awakened to the fact that such a contract might be used. Neither can it be urged that the reason for the old rule had just at that time ceased, and therefore the rule should be dropped. There was no change in conditions just then, no cessation just then, or within a century before, of the reason for the rule, which justified a cessation of the rule. Indeed, at the very moment the courts were preparing the way for these special contracts, they were, if possible, more strenuous than ever in insisting upon the soundness and wisdom of this "politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons that they may be safe in their ways of dealing," as Lord HOLT had stated the matter in his celebrated opinion.¹³ These remarks, said BRONSON, J., in 1838, lose little of their force when applied to the case of passengers in stages, steamboats, and railroad cars. And in 1847 NISBET, J., in his very able opinion,¹⁴ was so impressed by the era of stir, of multiplication of common carriers, by the "age of railroads, steamboat companies, stage companies, locomotion and transportation," that he thought the convenience and safety of the people required more than at any other period of the world's history, that there should be no relaxation of the common law stringency. The New York Court,¹⁵ with full knowledge of the holding of the English courts, refused to follow it, and shortly thereafter the same court by COWEN, J., said:¹⁶ "My conclusion is that he (the carrier) shall not be allowed in any form to higggle with his custom-

¹¹ *Nicholson v. Willan*, 5 East 513.

¹² See *Fish v. Chapman*, 2 Ga. 349.

¹³ *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

¹⁴ *Fish v. Chapman*, 2 Ga. 349.

¹⁵ *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234.

¹⁶ *Cole v. Goodwin*, 19 Wend. 251, 282, 32 Am. Dec. 470.

ers and extort one exception after another, not even by express promise or special acceptance any more than by notice. * * * He is a public servant with certain duties defined by law; and he is bound to perform these duties." Admitting that the plaintiff had, in the clearest manner, acceded to the exemptions, the Judge thought that the contract thus made was void as contrary to the plainest principles of public policy, and such, he says, it is expressly admitted by the English judges was the law in the period when our ancestors declared themselves independent. The case that called forth this language did not involve a special contract, but only a general notice. Four years later, however, in the case already referred to,¹⁷ a special acceptance came before the court, and COWEN, J., speaking for the court, referred to *Cole v. Goodwin*, supra, and held that public policy demanded a repudiation, not of a general notice only, but equally of a contract.

And other courts were not silent. In 1839 one of the greatest of our state judges, GIBSON, C.J.,¹⁸ seems impressed by the authority of what he terms an unfortunate direction of the English decisions, but, notwithstanding, thinks "it is still almost susceptible of a doubt whether an agreement to lessen the common law measure of a carrier's responsibility is not void by the policy of the law. In 1847, NISBET, J.,¹⁹ was in no doubt upon the question and, after a careful survey of the authorities, English and American, concludes that notice, receipts, and contracts in restriction of the liability of the common carrier are void, because these contravene the policy of the law.

Such was the state of the case when, in the very next year, 1848, the momentous case that was to settle the rule, though not its limits, that the common carrier might by special contract secure exemptions, came before the United States Supreme Court. The situation was weighted with consequences realized but faintly by court or litigants. What an opportunity for the court to make or to stop litigation! In view of the state of opinion as expressed by various courts before this time, who can doubt that, if the Supreme Court of the United States had unequivocally added the great weight of its opinion to the judicial expressions above noted, this case would have settled, once and for all, that no contract, any more than a notice, can in any way affect those duties of a common carrier which are imposed by law? But the court did not so decide, and that the result, however much it may have satisfied the

¹⁷ Gould v. Hill, 2 Hill (N. Y.) 623.

¹⁸ Atwood v. Reliance Transportation Co., 9 Watts (Pa.) 87.

¹⁹ Fish v. Chapman, 2 Ga. 349.

court, was satisfactory to no one else, not even to courts generally, is only too well attested by the flood of litigation that sixty years of time have not served to stem. The incurable dissatisfaction of the shipper is shown by his constant resistance to the efforts of the carrier to take advantage of the decision—a resistance which shows no sign of diminution, notwithstanding the inequality of a contest between an individual shipper on the one hand and the powerful carrying corporations on the other. Within the past six years there have been opinions handed down by the courts of last resort in at least fifteen states and in more than one hundred cases, in which it has been thought necessary to again assert the elemental rule that, by means of a contract between the carrier and the shipper the common law liability of the carrier may be restricted. In addition to these there are several hundred more in which the courts have been studying various aspects of the nature or extent of the limitations that shall be considered valid. The railroads on their part have been equally persistent in inserting in these contracts of shipment clauses that the courts have declared again and again to be invalid, and in appealing to the courts to extend beyond the limits marked out in the past the rule relieving the carrier's liabilities. It seems to be a question that will never down, because neither party is satisfied with the result.²⁰

Further evidence of the unsatisfactory results of this decision is to be found in that fact that in many of the states there are

²⁰ The following, out of many, may be cited as very recent cases in which the courts have felt it necessary to reiterate the well worn rule that the carrier may contract, but cannot stipulate against liability for losses due to its negligence.

Alabama. *Southern Express Co. v. Owens*, 146 Ala. 412, 41 South. 752.

Arkansas. *St. Louis S. W. R. Co. v. Wallace*, (Ark.) 118 S. W. 412.

Georgia. *Atlanta & W. P. R. Co. v. Broome*, 3 Ga. App. 641, 60 S. E. 355; *Branon v. Atlanta & W. P. R. Co.*, 4 Ga. App. 749, 62 S. E. 468.

Illinois. *Baltimore & O. S. W. R. Co. v. Fox*, 113 Ill. App. 180; *Wabash R. Co. v. Foster*, 127 Ill. App. 201.

Michigan. *Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 97 N. W. 721, holding that the rule did not apply to a side track.

Mississippi. *Yazoo & M. V. R. Co. v. Grant*, 86 Miss. 565, 38 South. 502, 109 Am. St. Rep. 723; *Southern Express Co. v. Marks*, 87 Miss 656, 40 South. 65, 112 Am. St. Rep. 466.

Missouri. *Fulbright v. Wabash R. Co.*, 118 Mo. App. 482, 94 S. W. 992; *Libby v. St. L. I. M. & S. R. Co.*, (Mo. App.) 117 S W. 659.

New Jersey. *Paul v. Pa. R. Co.*, 70 N. J. L. 442, 57 Atl. 139; *Atkinson v. N. Y. Transfer Co.*, (N. J.) 71 Atl. 278.

North Dakota. *Hanson v. Great Northern R. Co.*, (N. D.) 121 N. W. 78.

Pennsylvania. *Eckert v. Pa. R. Co.*, 211 Pa. 267, 60 Atl. 781, 107 Am. St. Rep. 571.

Texas. *International & G. N. R. Co. v. Vandeventer*, (Tex.) 107 S. W. 560.

Washington. *Jolliffe v. North Pacific R. Co.*, (Wash.) 100 Pac. 977.

United States. *Inman v. Seaboard Air Line R. Co.*, 159 Fed. 960; *Wilson v. Atlantic Coast Line R. Co.*, 129 Fed. 774; 133 Fed. 1022, 66 C. C. A. 486, holding that the rule did not apply to carrying a circus train.

provisions inserted in the constitutions, or statutory enactments, forbidding the carrier, wholly or in large part, to attempt by contract to escape the common law liability. In nearly every state in the Union there are some statutes with reference to this question, and it has formed an important part of all recent Federal legislation with reference to common carriers. Some description of this statute law will later be given.

If such was the opportunity of the court, by denying the validity of these contracts, to quiet the waters of a troubled sea, what shall be said of the opportunity presented to the carrier to serve both himself and the public by refusing to ask these exemptions, even if the courts were ready to grant them? The carrier was in position to say to the public: "You require of me, with certain exceptions, to act as insurer of the goods entrusted to my charge. So far from attempting to escape this liability, I will accept it, and more. I will insure without any exceptions, other than the results of the acts of the shipper himself. I am carrying on a great business, in which it is not difficult to determine the cost of insurance. In this business, properly conducted, that cost is not great. The law holds me liable in respect of my reward, and I shall include in that reward, in addition to the carrying charge, the small amount necessary to cover the cost of insurance." That cost would have been easily determined, and felt slightly, or not at all. By adding to the rates of carriage, the carrier would have escaped all loss and might even have derived profit, with very little added expense, from the legitimate charges for doing an insurance business. The carriers had at hand a full complement of agents and officers for their other business, and were therefore in much better position than an insurance company to do this for the shipper. What consequences hung upon the decision! All the millions since spent in fighting in the courts for the exemptions that have been secured, would have gone far toward paying for the losses the carriers sought to escape. But far more important than these considerations is the fact that the carrier, by accepting his full liability and charging the shipper accordingly, might thereby have earned favor with a public which his persistent efforts in the other direction have generally embittered, and whose good will, in these troublous times of adverse legislation, he sorely needs. Instead of pursuing this course, the carrier expended millions to dodge this business opportunity, at a cost of prejudice and hatred on the part of the public that makes the carrier avoid a jury as a pest and that, in recent years, has beyond doubt led the carrier to submit to much legislation that is extreme and unjust, rather than further aggravate this public that now seems to have little

regard for even the just rights of the carrier. If it be urged that, while the great steamship and railroad carrying corporations could have done this insurance business, it would have been a great hardship for small carriers with business too limited to admit of estimating the cost of insurance and who might be ruined by the loss in a single case, the answer is that it is precisely these carrying corporations, who would have been in no danger in offering to insure, that have availed themselves of the special contract as a way of escape, while the small carriers almost universally carry without contract or limitation. The extent of the animosity and objection on the part of the shippers to the rule of law excusing the carrier, cannot be arrived at by counting the myriads of cases that have reached the courts of last resort. These are but sporadic outbreaks—outer visible signs of the inner disturbances of the body politic. Countless other cases never went beyond the trial court, and a still greater number never reached the courts at all, the shipper feeling his inequality in the courts and, therefore, nursing his festering sore against the carrier and giving expression to his feeling when he succeeds in getting on a jury or in a legislature, or finds an opportunity to take advantage of the carrier in some other shipment.

But whatever opportunities were open to the carrier to engage in a profitable insurance business, the carrier did not desire to embrace them. And whatever the courts might have done to settle, instead of unsettle, liability in the carrying business by refusing to open the door to contract exemptions, the fact is they did open wide this door. At this late day it may seem a useless expenditure of time to consider what might have been, and yet it is believed that it is only by fully realizing all the conditions above mentioned that one can acquire an intelligent understanding of the present course of legislation, and also of the course of judicial opinion, with all its contradictions, real or apparent, during the sixty years since the decision written by Mr. Justice NELSON.

During the twenty-five years following that decision there is much uncertainty as to the scope of the rule therein laid down. The New York courts, as above noted, drawing a natural inference from the opinion, reversed their former holding against any possibility of a contract exemption and proceeded to the other extreme, allowing a carrier by contract to secure relief from liability, even for negligence, provided that were an express term of the contract. The case that finally settled this point was decided in 1862 by a divided court of four against three. The great ability of the dissenting view, written by DENIO, J., in that case, and the fact that this bare majority was obtained only by the change of view of one of the

judges, takes much from the force of this opinion.²¹ DENIO, J., in his dissenting opinion insisted vigorously upon the impolicy and immorality of contracts stipulating for immunity from negligence either of servants or of the carrier itself.

It was not until 1873—twenty-five years after the decision of the *New Jersey Steam Navigation Company v. Merchants' Bank*, that the great case of *Railroad v. Lockwood*²² marked a third important step in the course begun by *Hollister v. Nowlen*, supra, and continued by the *New Jersey Steam Navigation Company v. Merchants' Bank*, supra. The *Lockwood* case involved the liability of a carrier for injuries, caused by the negligence of the carrier, to one riding on a drover's pass. With great clearness and ability BRADLEY, J., in that case while accepting the rule denied the reasons therefor as stated in the *New Jersey Steam Navigation Company v. Merchants' Bank*. He showed that the duties of the railway were imposed, not by agreement, but by law; that the railway, therefore, could not by contract put off the essential duties of its employment and its character as a common carrier and become an ordinary bailee for hire. He also denied another view suggested in the earlier case, and pointed out with great force that, so far from seeing no reason why the parties should not be left to make their own contracts, there was such a hopeless inequality between the shipper and the carrier as to require the intervention of the courts to prevent the carrier from extorting from the shipper assent to whatever conditions the carrier might impose. He found no objection to stipulations between the parties, unless they were unreasonable and unjust, and therefore held: "First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; second, that it is not reasonable in the eye of the law for the common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants." He thus settled what in the absence of statute is now believed to be the rule in all jurisdictions, except New York, and probably, since the Public Commissions Act, Session Laws, 1907, in New York also, that stipulations against the negligence of the carrier are invalid. The carriers have never fully accepted this, however, and even at the present time, as elsewhere noted in this article, continue to insist upon provisions excusing them in one way or another from their negligence.

That the learned justice did not see that his own argument made

²¹ *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369.

²² 17 Wall. (U. S.) 357.

so clear the inequality of the parties as to make any talk about assent by the shipper, and therefore about any real contract at all, a mere form of words, seems strange, indeed. It is perhaps accounted for on the ground that the court regarded as *stare decisis* the general principle that the carrier might by contract limit his common law liability, and accordingly concerned itself merely with fixing the extent to which such limitation might go. And yet, when one regards the situation as it is so well drawn by Mr. Justice BRADLEY himself, it seems a travesty to speak of any real contract between carrier and shipper. "The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what one or the other contains. In most cases he has no alternative but to do this or abandon his business." Under such conditions what real assent is possible? Why allow a carrier, under cover of a so-called contract, to do that which he has countless times been forbidden to do under a notice, or in any other way? By notice he can impose upon the shipper those reasonable rules and regulations which every person has a right to adopt in the conduct of his business.²³ To these no assent is required. These the carriers have a right to impose without assent. To allow the carrier to secure more than these by an alleged contract, which, in the language of the court, "he has no alternative but to accept or abandon his business," opened again the way for the carrier, by forcing the shipper continuously to call upon the courts to stand between him and the powerful carrying corporations, to continue the litigation which had been going on for twenty-five years. Indeed, the litigation before this time was trifling in comparison with that which now began. The logic of the court seemed to call for a reversal of the rule of the *New Jersey Steam Navigation Company v. Merchants' Bank*, but, rather than do this, the court sought to interpose its protection between the shipper and stipulations that were not reasonable and just. One may well wonder if the court realized how often and at what cost the shipper would be compelled to ask the court thus to interpose, or how many would choose rather to endure any conditions than to try the uncertainty and expense of a determination by the courts of what is reasonable and just.

That the carrier was not slow to realize this advantage was ap-

²³ *Macmillan v. M. S. & N. I. R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

parent from the ingenuity and variety of attack by which he continued to seek from the customer some exemptions on the chance that they would not, perhaps, be tested, or, if tested, that they would be held to be reasonable and just. That he also realized that stipulations, clearly unreasonable, might deter many a shipper from pushing his claim, seems clear from the fact that down to the present time he continues to put into bills of lading terms that have countless times been declared by the courts to be invalid.

The *Lockwood* case, then, opened a great field of contest as to what might be deemed reasonable and just, and over this field the combatants have charged and counter-charged with undiminished zeal for all these thirty-five years. Failing often in the contest, the shipper has turned to the legislature, and every state has had written into the statutes or constitution such provisions as he (for self-defense) could wrest from legislators. The carriers have been obliged to endeavor to check these efforts, sometimes by the use of dishonorable and corrupting pressure and even compulsion upon the legislators. Thus far it is a drawn battle, in which both sides have suffered serious injury. Indeed, in recent years carriers have often considered it politic to submit to harrying and sometimes unjust legislation rather than further aggravate their fierce and at times unreasoning opponents—the public. On the other hand, the public has often been defeated in securing much that might well have been granted. Only the lawyers representing the parties seem to have profited from the contest.²⁴

The case of *Hart v. The Railroad*,²⁵ decided in 1884, marks the next important step. Carriers, finding they could no longer secure exemption from their liability for negligence, had begun to attempt to diminish their liability by fixing the amount of the damage. In the *Hart* case valuable race horses were shipped under a bill of lading which provided "that the plaintiff is to pay the rate of freight expressed 'on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: if horses or mules, not exceeding two hundred dollars each.'" The court held that in such a case the presumption is conclusive that the compensation charged was based on the valuation fixed and that, if a greater value had been named, a greater charge would have been

²⁴ For two of many recent examples of contracts excusing the carrier from part of his liability for negligence, see *Atchison T. & Santa Fe Ry. Co. v. Smythe* (Tex. Civ. App.), 119 S. W. 892, in which the carrier was to be liable only for injuries from collisions or derailments, and *International & G. N. R. Co. v. Vandeventer* (Tex. Civ. App.), 107 S. W. 560, in which a carrier attempted to escape liability except for gross negligence.

²⁵ 112 U. S. 331.

made. Not only is such a rule no violation of public policy, but a contrary rule would be unjust and unreasonable and a fraud upon the carrier." On an action for \$19,800 a recovery of \$1,200 was allowed.

With the public this decision has been no more satisfactory than the other, and, during the twenty-five years since it was supposed to settle the law on this point, the law books have been full, and never more so than in the last five years, of cases contesting this rule or some attempted application of it.²⁶ The question involves a real difficulty. There is no doubt that the carrier is entitled to be compensated for his service and for his liability, and to know, if he cares to ask, the value of the goods for which he assumes risk. If the shipper, in negotiating with him, were on an equal footing as a contracting party, the justice and equity of the rule laid down in the *Hart* case could not be questioned. But whatever the theory, the fact is that, in a large number of cases, the charges are not graduated to the value fixed. It seems too plain for argument that, if the carrier is to be an insurer, instead of to carry under a limited liability, or if he is to assume a risk at a given amount instead of a less risk, then he should be allowed to charge just enough more to cover the reasonable cost of the added risk, and, in cases where greater care is called for on account of the value or nature of the article carried, of the added care. But to allow him in one case to charge three times as much for assuming the common law liability,²⁷ in another case twenty-five per cent more,²⁸ in another case twenty per cent more,²⁹ and in others ten per cent more,³⁰ seems to be neither scientific nor just. The first rate³¹ was held to be clearly unreasonable, but an examination of the cases fails to reveal that the courts thus far have made any effort to determine what is a reasonable excess charge, to discover a proper method of arriving at such charge, or whether the added cost is the actual cost of the added risk, or whether it is simply in a general way an amount that commends itself to the court as reasonable. But when the bill of

²⁶ A few of the recent cases on this point are collected in note 35.

²⁷ *Railroad v. Lockwood*, 17 Wall. (U. S.) 357.

²⁸ *Latta v. Chicago, St. P. M. & O. Ry. Co.*, 172 Fed. 850.

²⁹ *Faulk v. Columbia, N. & L. R. Co.*, (S. C.) 64 S. E. 383; *Blackmer & Post Co. v. M. & O. R. Co.*, (Mo. App.) 119 S. W. 1.

³⁰ *Mires v. St. L. & S. F. R. Co.*, (Mo. App.) 114 S. W. 1052; *Southern Express Co. v. Fox*, (Ky.) 115 S. W. 184. In *Greenwald v. Weir*, 111 N. Y. Supp. 235, the excess charge was 10 cents for each \$100 declared in excess of \$50. In *Inman v. Seaboard Air Line R. Co.*, 159 Fed. 960, is a very typical provision for a reasonable addition to the charge on a higher valuation. What this reasonable amount would be does not appear.

³¹ *Railroad v. Lockwood*, 17 Wall. (U. S.) 357.

lading provides that, unless the shipper declares a value in excess, the agreed value of animals shipped shall not exceed one hundred dollars each, but that, if he does declare an excess above one hundred dollars, an additional twenty-five per cent to the charges shall be made, up to the value of eight hundred dollars, and that, when the value declared is greater than eight hundred, the charges shall be two hundred per cent of the rate based on a value of eight hundred dollars,³² it seems too clear for argument that the charges are based upon no proper regard for the cost of doing the business. It ought to be as possible for a carrier to make experience tables showing cost of risk for different values and services as for an insurance company to make its tables of premiums on life insurance.

The result of this situation is a great variety of judicial opinion as to the force and validity of contract stipulations limiting the amount of recovery. The limits of this article forbid any extended reference to the various aspects in which the question has arisen, but we shall note a few of the principal lines of thought, lying between the cases which uphold almost any sort of limitation as to value, as in a California case,³³ and the Alabama cases that seem to regard such stipulations as altogether void. Thus, in the California case it appeared that the bill of lading stated that the company, if liable at all for horses shipped, should not be liable beyond twenty dollars in each case, the agreed valuation of each horse as fixed in this contract of shipment. Two race horses were shipped under this bill of lading and, through the negligence of the carrier, were injured to the extent of \$2,700, but the court held that this contract, which agreed that horses were worth twenty dollars each, was not an attempt to relieve the carrier from his liability for the actual value of the property shipped, nor would it provide a partial exemption nor a total exemption from such liability. On the contrary, the carrier assumes such responsibility to the extent of the full value as declared by the shipper. Of course it is a matter of common knowledge that ordinary horses are worth far more than twenty dollars, and we may therefore presume that the California court would have upheld a contract fixing the agreed value at one dollar each, or at even less than that. Such a holding seems to admit a practical negation of the rule that a contract excusing the carrier from liability for negligence cannot avail, even when the shipper fairly assents to it.

In this case there was a very vigorous dissent by SHAW, J., in which he said that, if the carrier may make an agreement in advance

³² *Latta v. Chi., St. P., M. & O. Ry. Co.*, 172 Fed. 850.

³³ *Donlon v. So. Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811.

that his liability shall not be the actual value of the goods, but something less, which the carrier and the shipper shall agree is to be considered, for the purposes of shipment, the value of the property, then the private contract, as a matter of fact, does exonerate the carrier to that extent. Theoretically "no person is compelled to avail himself of the services of common carriers, for he may walk or hire his own conveyance; but practically the thing is compulsory and the terms must be those fixed by the carrier. If the provision were made solely or chiefly for the benefit of the shipper or passenger, the theory that he might waive his right, or that he might be estopped to assert it by his conduct or by his contract fairly made, would be perfectly sound and reasonable. But the law is not made for the benefit of the shipper or passenger alone. It is founded on public policy, having for its object the safety of human beings from death or injury and the prevention of the destruction of property. Where a course of conduct is required by law in furtherance of such public policy, it is not within the province of the individual immediately interested to dispense with an obedience to its provisions by any agreement."

For the reasons so clearly stated in this dissenting California opinion the Alabama courts have declined to uphold stipulations limiting the amount, to which the carrier should be held liable, at any sum less than the actual loss of the shipper. Thus in the *South-ern Express Company v. Owens*,³⁴ after full consideration, the court was unable to see the difference between a contract for an agreed valuation, when the real value was much greater, and a contract for total exemption from liability for losses due to negligence. "If the one can be enforced, the other can. If either be invalid, it would seem that both must be held to be so." This was, however, held not to apply to cases where the shipper, either by acts or omissions, practices a fraud upon the carrier as to the value of the goods carried.

The great case upon this subject is, of course, that of *Hart v. The Railroad*, *supra*. The argument of the court was that such a qualification of the rule as to the carrier's liability was reasonable and just. "It is just to hold the shipper to his agreement fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties had intended he should assume.

³⁴ 41 South. 752.

* * * The limitation as to value has no tendency to exemption from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond, in that value, for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. * * * It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy if a shipper should be allowed to reap the benefit of a contract, if there is no loss, and to repudiate it, in case of loss." This case has been followed in a great majority of the jurisdictions in this country.³⁵

In Illinois it has been held that from mere acceptance by the shipper of a bill of lading containing stipulations as to the amount of liability, in case of negligence, his assent shall not be implied to the conditions of the bill of lading, and any contract, limiting value in case of gross negligence, is invalid as much as though it had been a contract for a total exemption from liability.³⁶

There are many recent cases denying in whole or in part the operation of the rule in the *Hart* case. The limits of space forbid more than a reference to some of the more interesting of these cases.³⁷ The various rules are well set forth with copious citations

³⁵ The following are a few of the recent cases approving this doctrine: *Atlantic Coast Line R. Co. v. Dexter* (Fla.), 39 South. 634; *Gerry v. Amer. Express Co.*, 100 Me. 519, 62 Atl. 498; *Hood v. Service Co.* (Mass.), 77 N. E. 638; *So. Express Co. v. Stevenson* (Miss.), 42 South. 670; *Warehouse Co. v. M. K. & T. R. Co.*, 124 Mo. App. 545, 102 S. W. 11; *Townsend v. U. S. Exp. Co.*, 133 Mo. 683, 113 S. W. 1161; *Mires v. St. Louis and S. F. R. Co.* (Mo. App.), 114 S. W. 1052; *Saunders v. Adams Express Co.* (N. J.), 69 Atl. 206; *Atkinson v. N. Y. Transfer Co.* (N. J.) 71 Atl. 278; *Faulk v. Columbia and L. R. Co.* (So. Car.), 64 S. E. 383; *Black v. Atlantic Coast Line R. Co.* (S. C.), 64 S. E. 418; *Windmiller v. No. Pac. R. Co.* (Wash.), 101 Pac. 225; *Taylor v. Weir*, 162 Fed. 585. See also the following recent New York cases: *Royal Costume Co. v. Weir*, 95 N. Y. Supp. 575, 48 Misc. 378; *Lansing v. N. Y. C. and H. R. R. Co.*, 102 N. Y. Supp. 1092, 52 Misc. 334; *Feld v. Platt*, 110 N. Y. Supp. 1118, 59 Misc. 226; *Baum v. L. I. R. Co.*, 108 N. Y. Supp. 1113, 68 Misc. 34; *Carleton v. N. Y. C. and H. R. R. Co.*, 117 N. Y. Supp. 1021.

³⁶ *Chi. & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 61 N. E. 1095, 88 Am. St. Rep. 68, and extended note on page 74; *Wells Fargo & Co. v. Cutter*, 140 Ill. App. 324, affirmed in 237 Ill. 247, 86 N. E. 695, where the contract limited the liability to fifty dollars, though the charges paid the carrier for the shipment amounted to \$98.10.

³⁷ *Kan. City So. Ry. Co. v. Embrey* (Ark.), 90 S. W. 15; *Kan. City So. Ry. Co. v. Carl* (Ark.), 121 S. W. 932; *So. Exp. Co. v. Gibbs* (Ala.), 46 South. 465; *Ala. Great So. R. Co. v. McCleskey* (Ala.), 49 South. 433; *Central of Ga. R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679; *Louisville & Nashville R. Co. v. Warfield* (Ga.), 65 S. E. 308; *So. Exp. Co. v. Fox* (Ky.), 115 S. W. 184; *So. Express Co. v. Marks* (Miss.), 40 South. 65;

of cases in a recent North Dakota decision,³⁸ in which it was held that the value, in a bill of lading, which was set without inquiry or investigation as to the true value of the property, is arbitrary, is not just and reasonable, and is therefore invalid. And the same conclusion was reached in a late Minnesota case, where the freight paid for the shipment amounted to \$330, and the value of the goods shipped was \$2,000, but the printed receipt limited the liability to \$50.³⁹

We have now traced the evolution of the process whereby the "politic establishment," fixing upon common carriers a liability as insurers, save where losses are due to certain excepted perils, has been changed to a "contract establishment," whereby the liability of the carrier is fixed by an agreement with each shipper, except as this contract may be unreasonable and unjust. We have seen how *Hollister v. Nowlen* settled the rule that a general notice, even when brought home to the knowledge of the shipper but not assented to by him, could not affect the liability of the carrier; how the *New Jersey Steam Navigation Company v. Merchants' Bank* established the rule that a carrier might contract for some limitation of his common law liability; how the *Railroad v. Lockwood* limited the operation of the rule to stipulations that are reasonable and just, and excluded as unjust stipulations or agreements excusing the carrier from liability for negligence; and finally, we have seen how *Hart v. Pennsylvania Railroad* settled, or shall we rather say unsettled, the right of the common carrier, by inserting in the bill of lading a fixed valuation as the agreed value of the goods for the purposes of the shipment, to limit the amount of recovery to such fixed value, even where the loss is due to the negligence of the carrier.

So much for the courts. It now remains to notice very briefly what some of the legislatures have been doing with reference to contracts affecting the liability of a common carrier, and to cite a few of the cases referring to such statutory provisions. Many of

Miller v. C. B. & Q. R. Co. (Neb.), 123 N. W. 449; McConnell v. So. Ry. Co. (N. C.), 56 S. E. 559; Paul v. Pa. R. Co., 70 N. J. L. 442, 57 Atl. 139; Eckert v. Pa. R. Co. (Pa.), 60 Atl. 781; Atchison, Topeka & Santa Fe Ry. Co. v. Smythe (Tex. Civ. App.), 119 S. W. 892; Baltimore & O. R. Co. v. Oriental Oil Co. (Tex. Civ. App.), 111 S. W. 979, holding that the liability of a common carrier extends, not only to the duty to carry safely, but also to recompense the shipper in damages to the fullest extent. "Any agreement that diminishes or destroys those liabilities in either of these respects would be contrary to public policy and void—certainly where the loss is attributable to the negligence of the carrier." International and G. N. R. Co. v. Vandeventer (Tex.), 107 S. W. 560; Clarke-Lawrence Co. v. C. & O. Ry. Co. (W. Va.), 61 S. E. 364.

³⁸ Hanson v. Great Mo. Ry. Co. (N. D.), 121 N. W. 78.

³⁹ Murphy v. Wells Fargo & Co., 99 Minn. 230, 108 N. W. 1070.

these statutes are so recent that any attempt at a comprehensive discussion of their effect is quite impossible until the courts of last resort have had further opportunity to consider the questions arising under them. It may be noted that substantially all of these statutory provisions are in the direction of a return to the strict liability that prevailed before the courts began those relaxations of the common law rule which we have been discussing. Whether these changes will continue until the full common law liability of the carrier is once more restored in all cases, it is, of course, quite impossible to say. With the commissions, such as the Interstate Commerce Commission, and others, that have been created, it is possible that a way may be found to so adequately supervise all shipping contracts as to grant to the carrier certain privileges without exposing the individual shipper to unjust exactions. It is submitted that there are strong arguments for the contention that it would be much simpler and more satisfactory to all parties concerned if the carrier were to assume full responsibility for all shipments, and make a reasonable charge for his services and risks.

To prevent the common carrier from modifying his common law liability, the constitution of the State of Nebraska⁴⁰ provides "the liability of railroad corporations as common carriers shall never be limited."⁴¹ A similar constitutional prohibition has been adopted in Kentucky.⁴² There are statutes affecting this question probably in all of the states, but many of them agree substantially with the decisions of the courts, and we may pass this subject with the reference to two of the most important statutes, and a citation of cases touching upon statutes in other states.⁴³

The most important recent act, not only because it affects interstate shipments in every state, but also because of the provisions of

⁴⁰ Art. 11, § 4.

⁴¹ *Pa. Co. v. Kennard Glass Co.*, 59 Neb. 435, 81 N. W. 372; *Wabash R. Co. v. Sharpe* (Neb.), 107 N. W. 758.

⁴² *So. Express Co. v. Fox* (Ky.), 115 S. W. 184. Compare *Barnes v. Long Island R. Co.*, 100 N. Y. Supp. 593, 115 App. Div. 44 (reversing 93 N. Y. Supp. 616, 47 Misc. 318), affirmed 191 N. Y. 528, 84 N. E. 1108. The New York court construes the Kentucky law as permitting a limitation as to value, though the Kentucky courts construe the law as prohibiting such limitation.

⁴³ *California*. See *Donlon v. So. Pac. Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.), 811.

Georgia. *Central of Georgia R. Co. v. Hall*, 124 Ga. 322, 52 S. E. 679, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170.

Illinois. *Cutter v. Wells Fargo & Co.*, 237 Ill. 247, 86 N. E. 695, affirming 140 Ill. App. 324.

Iowa. *Powers v. C. R. I. & P. R. Co.* (Ia.), 105 N. W. 345.

Texas. *International & G. N. R. Co. v. Vandeverter* (Tex.), 107 S. W. 560.

Virginia. *Norfolk & Western Ry. Co. v. Harman* (Va.), 52 S. E. 368; *So. Exp. Co. v. Keeler* (Va.), 64 S. E. 38; *Chesapeake & O. Ry. Co. v. Pew* (Va.), 64 S. E. 35.

the act itself, is the Hepburn Act, passed by Congress in 1906. With reference to the point under discussion this act provides⁴⁴ "that any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be transferred or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading, of any remedy or right of action which he has under existing law."

It is of course too early to say what effect this act will be found by the courts to have had upon the liability of the common carrier. If it means what it seems to say, then hereafter no common carrier can, by a contract, escape liability for any injury to property caused by the common carrier, either through its negligence or otherwise, either through the acts of the contracting carrier or those of a connecting line. And more than that, this Federal law does not have any effect to supersede rights which the shipper may have had under previous state laws. In accordance with this interpretation it was held by a Federal court in the very recent case of *Latta v. Chicago, St. P., M. & O. Railway Company*⁴⁵ that an interstate shipment from a point in Nebraska was subject to the Nebraska law, which forbids any limitation of the carrier's common law liability. The court intimated that a limitation as to the amount of the liability, in the absence of a contract rule in the state where the shipment was made, would still be governed by the rule in *Hart v. Pennsylvania Railroad Company*, but, as Nebraska had refused to follow that decision, the Federal court would, on a Nebraska shipment, follow the Nebraska rule.⁴⁶

This provision of the Hepburn Act has been noticed in a number of state decisions, of which we may note the interesting case in New York⁴⁷ in which the Appellate Term in 1908 held that the Hepburn Act had changed the common law rule so that a stipula-

⁴⁴ June 29, 1906, c. 3591, § 7; 34 Stat. 595; (U. S.) Comp. St. Supp. 1907, p. 909.

⁴⁵ 172 Fed. 850. See also *Pa. R. Co. v. Hughes*, 191 U. S. 477, 24 Sup. Ct. 132; *Miller v. C., B. & Q. R. Co.* (Neb.) 123 N. W. 449, and 8 Mich. L. Rev. 222.

⁴⁶ The court also cited *Grogan v. Adams Exp. Co.*, 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360, in which the Pennsylvania court refused to follow the Hart rule.

⁴⁷ *Greenwald v. Weir*, 111 N. Y. Supp. 235, overruled in 115 N. Y. Supp. 311, following *Barnes v. Long*, 100 N. Y. Supp. 593, 191 N. Y. 528, 84 N. E. 1108.

tion, limiting the value of goods shipped under an express receipt to fifty dollars, was invalid. In another case⁴⁸ the court said that if under the Hepburn Act a carrier might limit its liability to a fixed amount, "the shipper would have been entirely at the carrier's mercy," since the act compels the carrier to give a receipt and fixes his liability thereby, and the shipper must, of course, accept such receipt and abide by its provisions. The act says that no contract or receipt shall exempt the carrier from the liability hereby imposed, and this, the court says, applies, not to a total exemption, which has occasionally been forbidden, but to any limitations, for those are exemptions *pro tanto*. In the Appellate Division⁴⁹ the *Greenwald* case was overruled, the court finding that the Hepburn Act had no effect on the common law rule as to limiting the amount of liability. In reaching this conclusion, it followed *Barnes v. Long Island Railroad Company*,⁵⁰ which was a case arising under a Kentucky contract and involved, therefore, the construction of the Kentucky constitution forbidding a carrier to contract for relief from its common law liability. It is interesting to note that the New York court did not take the view of the Kentucky constitution upheld by the Kentucky courts,⁵¹ which agree with the view of the Appellate Term, instead of that of the Appellate Division.⁵²

The uniform bill of lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908, makes the following provisions with reference to the liability of the common carrier.

"The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights.

⁴⁸ *Vigouroux v. Platt*, 115 N. Y. Supp. 880, 62 Misc. 364.

⁴⁹ *Schutte v. Weir*, 111 N. Y. Supp. 240, 115 N. Y. Supp. 311.

⁵⁰ 100 N. Y. Supp. 593. See also *Carleton v. N. Y. C. & H. R. R. Co.*, 117 N. Y. Supp. 1021.

⁵¹ *So. Exp. Co. v. Fox* (Ky.), 115 S. W. 184.

⁵² See also, on the Hepburn Act, *Kansas City So. Ry. Co. v. Carl* (Ark.), 121 S. W. 932; *Louisville and Nashville R. Co. v. Warfield* (Ga.), 65 S. E. 308; 8 Mich. L. Rev. 331; *So. Pacific R. Co. v. Crenshaw*, 5 Ga. App. 675, 63 S. E. 865; *Travis v. Wells Fargo & Co.* (N. J.), 74 Atl. 444, in which the court held that the section of the Federal Statute, providing that no contract should exempt the common carrier "from the liability hereby imposed," applied only to a loss by the connecting carrier, the section having no effect whatever upon the common law liability of the receiving carrier.

For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with the general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

We have noted that the New York courts for many years have upheld contracts excusing the carrier from liability for negligence. The new Public Service Commissions Law⁵³ is, therefore, of more than ordinary interest. On this point this act provides: "Every common carrier and every railroad corporation and street railroad corporation shall, upon demand, issue either a receipt or bill of lading for all property delivered to it for transportation. No contract, stipulation or clause in any receipt or bill of lading shall exempt or be held to exempt any common carrier, railroad corporation or street railroad corporation from any liability for loss, damage or injury caused by it to freight or property from the time of its delivery for transportation until the same shall have been

⁵³ Laws 1907, p. 911, c. 429, § 38.

received at its destination and a reasonable time shall have elapsed after notice to consignee of such arrival to permit the removal of such freight or property."

If this provision is to be taken in the sense in which it seems to read, then we may agree with the New York court⁵⁴ that "a casual reading at first blush causes an impression that startling innovations" have been inaugurated by the statute, but the court is not carried away by any such casual reading, and by its strict interpretation of the statute seems to have reached the climax of emasculation of a statute by judicial interpretation. "A careful examination establishes conclusively" that this section does not apply to express companies, for they do not hold property after its arrival, but make a personal delivery of it. This section can apply only to freight, says the court. In view of the fact that this act, in a list of definitions, provides that "the term common carrier, when used in this act, includes railroad corporations, express companies, freight companies," etc., it seems at least strained to say that "common carrier" in this, one of its most important sections, does not mean express companies. The court offers no suggestion as to why the act should distinguish between express companies and any other common carriers. The fact seems too plain for doubt that the legislature intended to include them, but it is also clear enough that the statute can be read strictly enough to bring a technical mind to the conclusion reached by the decision, for it is true that express companies do not ordinarily hold goods at destination until "a reasonable time shall have elapsed after notice to consignee of such arrival to permit of the removal of such freight or property." But this is not the full extent of the emasculation. The court holds further that "exempt" does not mean "limit," for the one implies an absolute release, the other a restriction within certain bounds. For a carrier, as in this case, to limit to fifty dollars liability for goods worth \$1,192.88, is not forbidden. The act merely forbids a total exemption. We may well query what would be a total exemption. Would a limitation on goods of such value to five dollars or to one dollar be still regarded as a limitation and not an exemption?

Any present discussion of this subject must necessarily be only opening chapters to be later continued. Legislatures, state and federal, are just now actively engaged in fixing more and more exactly the liability of the common carrier, and the trend of the acts above noted, as well as that of many others, justify the belief

⁵⁴ *Baum v. L. I. R. Co.*, 108 N. Y. Supp. 1113.

that the impulse towards legislation will not die out until the legislator has found language which the courts cannot construe as allowing the carrier in any way to escape or decrease its liability for injury to goods carried, caused by the act of the carrier. Authoritative and final pronouncement upon the questions involved will be awaited with interest.

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